

Decision 13-09-033 September 19, 2013

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking to Continue  
Implementation and Administration of  
California Renewables Portfolio Standard  
Program.

Rulemaking 11-05-005  
(Filed May 5, 2011)

**DECISION GRANTING PETITION FOR MODIFICATION OF D.11-11-012 TO  
AUTHORIZE SOUTHERN CALIFORNIA EDISON TO EXECUTE A CONTRACT  
AMENDMENT TO EIGHTY CALIFORNIA RENEWABLE ENERGY SMALL  
TARIFF POWER PURCHASE AGREEMENTS**

**1. Summary**

ImMODO International Corporation's Petition for Modification of Decision 11-11-012 is granted. The request is undisputed. Southern California Edison (SCE) is authorized to offer the form amendment proposed in Attachment B of the Petition for the SCE California Renewable Energy Small Tariff (CREST) power purchase agreements approved in Resolution E-4593. The amendment would extend the 18-month initial operation deadline included in the approved standard CREST contracts by six months. The proceeding remains open.

**2. Procedural Background**

In 2006, the Legislature added § 399.20<sup>1</sup> to the Public Utilities Code which directs investor-owned utilities to establish standard tariffs to purchase

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<sup>1</sup> Assembly Bill (AB) 1969 (Yee, Stats. 2006, ch. 731).

renewable energy from water and wastewater customers. The Commission implemented § 399.20<sup>2</sup> in Decision (D.) 07-07-027 by adopting the feed-in tariff (FiT) for eligible facilities up to 1.5 megawatts (MW). The decision also expanded the FiT by directing Southern California Edison Company's (SCE) and Pacific Gas and Electric Company to offer standard tariffs and contracts to all customers in their service territories selling renewable energy from projects up to 1.5 MW. In D.07-07-027, the Commission ordered each utility to file an advice letter submitting a tariff and standard contract for public water and wastewater agencies as well as a tariff and standard contract for all other customers.<sup>3</sup> Resolution E-4137 approved with modifications SCE's advice letter 2148-E including its two tariffs and associated pro forma contracts.<sup>4</sup>

In November 2011, the Commission adopted D.11-11-012, which made modifications to SCE's California Renewable Energy Small Tariff (CREST) standard contract in response to the Motion of Clean Coalition for Immediate Amendments of AB 1969 CREST Power Purchase Agreement (PPA). Clean Coalition's motion requested changes to SCE's CREST PPA so that small renewable developers would have an acceptable PPA to receive federal cash

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<sup>2</sup> All statutory references are to the Public Utilities Code unless otherwise indicated.

<sup>3</sup> Notably, D.07-07-027 required that, "Each respondent's tariff/standard contract will grant buyer the right to terminate the service if seller has not achieved commercial operation in 18 months from execution date. The seller shall be given reasonable notice and opportunity to address concerns before termination is effective." D.07-07-027 Attachment A, Summary of Major Changes to Proposed Tariffs and Standard Contracts, at 3.

<sup>4</sup> To comply with Resolution E-4137, SCE filed Advice 2244-E on May 23, 2008, to propose Schedule WATER – Water Agency Tariff for Eligible Renewables, Schedule CREST – California Renewable Energy Small Tariff, and associated pro forma contracts.

grants for their projects under § 1603 of the American Recovery and Reinvestment Tax Act.

One provision adopted in D.11-11-012 was a revision to Section 2.8 (Date of Initial Operation) of the CREST contract. Clean Coalition requested a modification to this provision to account for legitimate delays beyond the seller's control.

The Commission agreed that one six-month extension to a contract's initial operation deadline due to regulatory delays outside a developer's control should be incorporated into the CREST contract. The revised term continued to require CREST projects to achieve initial operation within 18 months from a contract's effective date, but allowed a day-for-day extension to the deadline up to six months for interconnection or permitting delays beyond the seller's control. The Commission ordered SCE to adopt the revised term, as proposed by Clean Coalition.<sup>5</sup>

On March 26, 2013 and April 22, 2013, SCE submitted to the Commission Advice Letters 2870-E and 2870-E-A requesting approval of eighty (80) CREST PPAs, with a cumulative capacity of 112.52 MW, that SCE had executed above its pre-authorized CREST capacity cap, as established by D.07-07-027. On June 27, 2013, Resolution E-4593 approved the 80 contracts. In the resolution, the Commission recognized that it had not previously addressed how the time required for Commission review of an advice letter seeking approval of excess FiT procurement would impact the requirement that FiT projects achieve their initial operation deadline (IOD) within 18 months of the effective date of the PPA. In the resolution, the Commission agreed with ImMODO that "certainty

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<sup>5</sup> D.11-11-012 at Ordering Paragraph 1.

about the duration of any [initial operation deadline] extension resulting from the delay associated with the Commission's review and approval of AL 2870-E/E-A would be desirable."<sup>6</sup>

On August 7, 2013, ImMODO filed the *Petition for Modification of D.11-11-012 and Request for Expedited Comment Period of ImMODO International Corporation* (Petition). D.11-11-012 was filed in Rulemaking 11-05-005, the RPS implementation and administration proceeding. This Petition requests the Commission modify the Decision to adopt a form amendment for those CREST PPAs to allow for a six-month extension to the 18-month IOD.<sup>7</sup> Timely responses to the petition, in accordance with Rule 16.4(f) of the Commission's Rules of Practice and Procedure,<sup>8</sup> were filed by SCE, Allco Renewable Energy Limited (Allco), and Silverado Power LLC (Silverado). SCE supports the petition and requests that the Commission authorize SCE to offer and execute the form amendment that ImMODO attached to the Petition. If granted, SCE commits to offer and execute the amendment.

### **3. Discussion**

#### **3.1. Timeliness of Petition**

Rule 16.4(d) provides that:

Except as provided in this subsection, a petition for modification must be filed and served within one year of the effective date of the decision proposed to be modified. If more

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<sup>6</sup> Resolution E-4593 at 16.

<sup>7</sup> See Appendix A.

<sup>8</sup> The Commission's Rules of Practice and Procedure are codified at Chapter 1, Division 1 of Title 20 of the California Code of Regulations. Unless otherwise indicated, all subsequent citations to rules refer to the Rules of Practice and Procedure, and all citations to sections refer to the Public Utilities Code.

than one year has elapsed, the petition must also explain why the petition could not have been presented within one year of the effective date of the decision. If the Commission determines that the late submission has not been justified, it may on that ground issue a summary denial of the petition.

The Petition was filed more than one year after the effective date of D.11-11-012. The petitioner points out that the circumstances under which the petition arose did not occur until March 2013. Specifically, SCE filed AL 2870-E on March 26, 2013 and AL 2870-E-A on April 22, 2013 requesting Commission review and approval of 80 CREST PPAs that they procured over its pre-authorized capacity cap for the CREST tariff. The Commission approved the procurement through Resolution E-4593 on June 27, 2013.

As discussed in the resolution, FiT contracts are typically considered approved upon execution of the standard contract and, therefore, subsequent Commission approval is not necessary. In this case, however, SCE filed the contracts for Commission review and approval. Despite the additional regulatory process associated with reviewing and approving SCE's advice letters, the requirement for CREST projects to achieve the initial operation deadline within 18 months of the effectiveness of the PPA remained unchanged. According to ImMODO, the additional regulatory process introduced uncertainty for their project development. ImMODO claims that, "if the ImMODO PPAs had been automatically approved, as originally anticipated, ImMODO would have been able to proceed within the timelines established in its PPA."<sup>9</sup> This uncertainty was unanticipated by the developer before March, 2013 and led to the filing of the Petition.

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<sup>9</sup> The Declaration of Don Watson at Attachment A of the Petition.

The petitioner properly points out that this request could not have been made within one year of D.11-11-012. The petitioners have met their burden under Rule 16.4(d) to justify submission of the Petition more than one year after the effective date of the decisions that are proposed to be modified.

### **3.2. Standard Feed-in Tariff Contracts - Background**

As discussed in D.07-07-027, the Commission adopted the FiT with a standard contract as a simple, streamlined program.<sup>10</sup> With a standard contract, a potential seller can review the tariff, standard contract terms and rates; perform its own analysis; and make necessary decisions (*e.g.*, contract length, whether to sign the contract).<sup>11</sup> The seller does not need to incur potentially substantial time and expense in lengthy or complex negotiations. A seller may elect to engage in negotiations, but the resulting deal would then be a bilateral or other type of contract, and outside the scope of the § 399.20 FiT program. The standard FiT contracts are deemed approved when executed, and do not need subsequent Commission approval.

In D.11-11-012, the Commission found it reasonable to modify several provisions in SCE's standard CREST contract since the Commission had gained a better understanding of the contract terms and conditions that balance the utility's, ratepayer's, and producer's interests. One provision of the standard contract that this decision amended was the CREST contract's requirement to achieve commercial operation within 18 months from the effective date of the PPA, the Initial Operation Deadline. A fixed IOD promotes a successful FiT

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<sup>10</sup> The law provides that an "electrical corporation may make the terms of the tariff available to public water or wastewater agencies in the form of a standard contract subject to commission approval." (§ 399.20(e).)

<sup>11</sup> D.07-07-027 at 8.

program because it encourages viable projects that can come online in a reasonable time frame and opens the queue to other projects if and when a project in the queue is subject to contract termination. However, experience with the program indicated that regulatory delays outside the developer's control could push out the online dates of viable projects beyond the fixed 18-month requirement. The Commission recognized that regulatory delays beyond the control of the seller, such as those due to utility interconnection application processes, are "legitimate delays [that] can occur relative to any timeline."<sup>12</sup> Accordingly, D.11-11-012 ordered SCE to incorporate a day-for-day extension to the 18-month IOD, for interconnection and permitting delays, so long as the facility achieves commercial operation within 24 months from the effective date of the PPA.

### **3.3. Proposed Form Amendment to Initial Operation Deadline Provision**

The petitioner now asks for the Commission to approve a form amendment to those CREST PPAs approved in Resolution E-4593, to account for unforeseeable regulatory delay. ImMODO states, "The regulatory delay associated with obtaining Commission approval of the Advice Letters introduced significant uncertainty, subsequently delaying closing on financing and start of construction on ImMODO's projects."<sup>13</sup> ImMODO asserts that it would have been able to develop the project within the timelines established in the PPAs if the contracts had been automatically approved, as they expected when they executed the FiT contracts.

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<sup>12</sup> The Commission also recognized the need for online date extensions due to legitimate regulatory delays in D.10-12-048 at 50.

<sup>13</sup> Petition at 3.

ImMODO argues that a 6-month extension of the IOD to account for this unforeseeable regulatory process would be reasonable. To further support its request, ImMODO points out that in Resolution E-4593 the Commission expressed a desire to provide developers with certainty about any extensions to the IOD because of the additional regulatory process associated with SCE's advice letter. Additionally, ImMODO argues that while D.11-11-012 only ordered SCE to adopt a 6-month IOD extension for interconnection and permitting delays, that there is language in that decision indicating that regulatory delays could legitimately warrant an IOD extension. Specifically, D.11-11-012 states that "language providing for an 18-month online date plus one 6-month extension for regulatory delays should be incorporated into the CREST PPA."<sup>14</sup>

ImMODO attaches a form amendment to the Petition including three suggested contract modifications that would replace the existing 18 month IOD term with a 24-month IOD term in those CREST PPAs approved in Resolution E-4593. The first change deletes the existing IOD language that was approved in D.11-11-012 and provides for a 24-month window for initial operation. The second and third modifications resolve potential inconsistencies in two other sections of the CREST PPAs that would exist if the first modification is approved.

SCE, Allco, and Silverado support the Petition. In its response, SCE states that it "fully supports the Petition," the form amendment, and the request for the Commission to authorize SCE to offer and execute the form amendment. Allco states its support as long as "(i) it is limited to the 80 Excess PPAs, and (ii) the

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<sup>14</sup> D.11-11-012 at 11.



amount of the Excess PPAs does not reduce SCE's allocation under the Renewable Market Adjusting Tariff (Re-MAT)."<sup>15</sup>

The form amendment proposed in the Petition, as supported by SCE, Allco, and Silverado, is reasonable. The Commission acknowledged its desire to provide certainty to the sellers of the CREST PPAs about the duration of an IOD extension in Resolution E-4593<sup>16</sup> since the standard CREST program does not include provisions for potential project development delays associated with the regulatory process for approving FiT procurement in excess of the capacity cap that is authorized in D.07-07-027 and Resolution E-4137. Also, it was unanticipated when D.11-11-012 was adopted that SCE would exercise its right to voluntarily procure beyond its CREST capacity cap. The IOD contract term that the Commission in D.11-11-012 ordered SCE to incorporate in the standard CREST PPAs for an extension up to 6 months to the IOD only specifically identifies interconnection delays and permitting delays. However, in response to the petition, we find that any project development delays associated with the uncertainty introduced from the submission and review of AL-2870-E/E-A constitutes a legitimate regulatory delay of the kind envisioned by D.11-11-012. The form amendment proposed by ImMODO would allow SCE to replace the existing 18 month IOD term with a 24-month IOD term to accommodate the regulatory delay associated with submission and review of Advice Letters 2870-E and 2870-E-A.

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<sup>15</sup> Allco Response to Petition at 2.

<sup>16</sup> At 16.

#### **4. Waiver of Comment Period**

Pursuant to Rule 14.6(b) of the Commission's Rules of Practice and Procedure, all parties stipulated to waive the 30-day public review and comment period required by Section 311 of the Public Utilities Code and the opportunity to file comments on the proposed decision. Accordingly, this matter was placed on the Commission's agenda directly for prompt action.

#### **5. Assignment of Proceeding**

Mark J. Ferron is the assigned Commissioner and Regina M. DeAngelis is the assigned Administrative Law Judge in this proceeding.

#### **Findings of Fact**

1. The Commission adopted Resolution E-4593 on June 27, 2013 approving 80 CREST PPAs representing 112.52 MW of capacity in excess of the capacity target authorized by D.07-07-027 and Resolution E-4137 for SCE's CREST tariff.

2. The delay associated with SCE's submission of Advice Letters 2870-E and 2870-E-A and the Commission's review and approval process of the 80 CREST PPAs approved in Resolution E-4593 constitutes a legitimate regulatory delay of the kind envisioned by D.11-11-012.

#### **Conclusions of Law**

It is reasonable and prudent to allow the parties to the 80 CREST PPAs approved in Resolution E-4593 to execute an amendment that would allow those projects to achieve Initial Operation, as that term is defined in the agreements, no later than 24 months from the effective date of the agreements.

**O R D E R**

**IT IS ORDERED** that:

1. Southern California Edison Company is authorized to offer and execute an amendment to the parties to the 80 California Renewable Energy Small Tariff Power Purchase Agreements approved in Resolution E-4593 that allows those projects to achieve Initial Operation, as that term is defined in the agreements, no later than 24 months from the effective date of the agreements.

2. Rulemaking 11-05-005 remains open.

This order is effective today.

Dated September 19, 2013, at San Francisco, California.

MICHAEL R. PEEVEY

President

MICHEL PETER FLORIO

CATHERINE J.K. SANDOVAL

MARK J. FERRON

CARLA J. PETERMAN

Commissioners

## **Appendix A**

AMENDMENT NO. 1  
to the  
CALIFORNIA RENEWABLE ENERGY SMALL TARIFF AGREEMENT  
between  
SOUTHERN CALIFORNIA EDISON COMPANY  
and  
[NAME OF PRODUCER]  
RAP ID #[Number]  
GFID #[Number]

This Amendment No. 1 ("Amendment No. 1") is entered into by Southern California Edison Company, a California corporation ("SCE"), and [Name of Producer], a [Legal Status of Producer] ("Producer") to amend that certain California Renewable Energy Small Tariff Agreement (RAP ID No. [\_\_\_\_]), effective [\_\_\_\_], 2013, between SCE and Producer (the "Agreement"). SCE and Producer are hereinafter sometimes referred to individually as a "Party" and jointly as the "Parties". Capitalized terms used and not otherwise defined in this Amendment No. 1 shall have the meanings ascribed to such terms in the Agreement.

In consideration of the promises, mutual covenants and agreements hereinafter set forth, and for other good and valuable consideration, as set forth herein, the Parties agree as follows:

1. Sections 2.9(a)-(d) of the Agreement are hereby deleted and replaced with the following:
  - (a) Initial Operation must be no later than twenty-four (24) months from the PPA Effective Date (the 'Initial Operation Deadline'). Notwithstanding anything in this Agreement to the contrary, the Initial Operation Deadline is not subject to any extensions or delays."
2. Section 4.1(e) of the Agreement is hereby deleted and replaced with the following:

"(e) Initial Operation does not occur on or before the Initial Operation Deadline;"

3. The final sentence of Section 9.2(c) is hereby deleted.

4. MISCELLANEOUS

a) Legal Effect. Except as expressly modified as set forth herein, the

Agreement remains unchanged and, as so modified, the Agreement shall remain in full force and effect.

b) Governing Law. This Amendment No. 1 shall be interpreted, governed, and construed under the laws of the State of California as if executed and to be performed wholly within the State of California without giving effect to choice of law provisions that might apply to the law of a different jurisdiction. Each Party waives its respective right to any jury trial with respect to any litigation arising under or in connection with this Amendment No. 1.

c) Counterparts; Electronic Signatures. This Amendment No. 1 may be executed in one or more counterparts, each of which will be deemed to be an original of this Amendment No. 1 and all of which, when taken together, will be deemed to constitute one and the same agreement. The exchange of copies of this Amendment No. 1 and of signature pages by facsimile transmission, Portable Document Format (*i.e.*, PDF), or by other electronic means shall constitute effective execution and delivery of this Amendment No. 1 as to the Parties and may be used in lieu of the original Amendment No. 1 for all purposes.

IN WITNESS WHEREOF, the Parties hereto have caused this Amendment No. 1 to be executed by their duly authorized representatives on the dates indicated below their respective signatures. This Amendment No. 1 is effective as of the last date set forth below.

**(End of Appendix A)**